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*Sent to the Government of Poland by email & by post*

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Dear Sirs,

The organisations and leaders within WIN, the Whistleblowing International Network, have worked in the field of public interest whistleblower law and practice for close to 40 years. Our expertise has been sought by national governments and judicial and law enforcement authorities, amongst many others around the world, looking to enhance their legal and institutional protections for whistleblowing. Our members have played a leading role at the Council of Europe, the European Union, the OECD and the United Nations as part of their mandates to support good governance and democratic accountability, the rule of law and human rights.

We write to express our unqualified agreement with the attached concerns expressed by the Fundacja im. Stefana Batorego (Stefan Batory Foundation), Helsińska Fundacja Praw Człowieka, (The Helsinki Foundation for Human Rights) and Instytut Spraw Publicznych (Institute of Public Affairs) about draft provisions of a "whistleblower" law recently proposed by the Minister, Special Services Coordinator, in the draft law on transparency of public life. The proposal purports to provide whistleblower protection for those who report evidence of certain criminal offences to the prosecutor. These provisions do not fall within the definitions nor spirit of legal whistleblower rights in any other country. Even if relevant, the provisions fail to meet even one of some 20 internationally accepted legal standards and best practices for whistleblower protection.

At best, if adopted this would be a witness protection law for criminal prosecutions, a related concept with only a narrow overlap to whistleblower rights. Unfortunately, if this legislation were proposed in our countries, we would be duty bound to warn even criminal witnesses against using it. It is a witness *control* proposal, not one even for effective witness *protection* let alone for whistleblower protection. At best, it would provide a temporary reprieve against employment retaliation, with an open season on the witness a year after the prosecution ends. In the meantime, the prosecutor could remove the protection at whim, without any judicial or other appeal. That means if the witness did not testify however instructed, the prosecutor could throw the witness to the wolves – exposing him or her to an employer's unrestrained revenge. Indeed, this total power over witnesses would undermine the credibility of any testimony they provide and actually make it more difficult to obtain convictions

We strongly urge the Government of Poland to reject this proposal on the basis that it:

- is not whistleblower protection;
- is not effective witness protection;
- dangerously undermines its own limited aim of bringing successful prosecutions for such offences;
- risks seriously eroding trust in Polish law enforcement authorities and therefore the willingness the public to engage in tackling corrupt conduct;
- reinforces the negative stereotype of a whistleblower as a state-informant, only motivated by egoistic or political intentions; and
- undermines any realistic efforts by the Government of Poland to encourage genuine whistleblowing about a wider range of public interest issues including potentially serious risks to health and safety, environmental damage, or breaches of other legal or regulatory violations that can result in significant damage or harm.

We urge the Government of Poland to engage in a full and robust process of consultation with civil society and social partners across the public and private sectors in Poland for a law consistent with international standards under UN Convention Against Corruption<sup>1</sup>. These are no mystery. For example, the attached evaluation criteria are consistent with the Council of Europe's Committee of Ministers Recommendation on the protection of whistleblowers and its Explanatory Memorandum<sup>2</sup>, which build on the work done by the G20<sup>3</sup> and the OECD, and all leading organizations within WIN, amongst others.

Last week (24 Oct 17) the Parliament of the EU voted by a majority of 399 to 101 in favour of adopting the Committee of Legal Affairs' Report on implementing comprehensive whistleblower protection across the EU and which called on the European Commission to "present before the end of this year [2017] a horizontal legislative proposal establishing a comprehensive common regulatory framework which will

<sup>1</sup> See UNODC Resource Guide on Good Practices in the Protection of Reporting Persons under UNCAC [http://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](http://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

<sup>2</sup> See CoE CM/Rec(2014)7 of 30 April 2014 of the Committee of Ministers of the Council of Europe on the protection of whistle-blowers. See [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5ea5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5)

<sup>3</sup> The OECD elaborated a complete study on G20 whistleblowers protection frameworks, including a compendium of best practices and guiding principles for legislation, which was supported by the G20 at the Summit in Cannes, November 2011. See <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>.



guarantee a high level of protection - in both the public and private sectors as well as in national and European institutions". The European Commission is now in the process of analysing the nearly 6,000 responses it received from across Europe, the vast majority (99.4%) in favour of strengthening whistleblower protection. An EU Directive would also recognise the importance of providing coherent protection across Europe, because whistleblowers can and do disclose information that reveals damage or harm caused across borders and in different member States. It is therefore in the interests of all EU Member States to get this right.

Whistleblowing is freedom of speech where it counts the most for society, not prosecutorial control of witness' testimony. As NGOs committed to that principle, we would warn any whistleblowers in our respective nations not to use this law if it were available. Its seductive title is a trap to place whistleblowers at the mercy of any prosecutor's agenda.

To be consistent with European and global norms for legitimate rights, this proposal should be withdrawn. If Poland is serious about protecting whistleblowers, it should start fresh from a foundation of international consensus criteria reinforced by public participation. The current proposal is false advertising that will fool no one. We pledge our full cooperation and support for any government efforts to establish legitimate whistleblower rights.

We trust that our submission will be duly considered by policymakers and legislators in Poland during their deliberations and importantly in considering the purpose of whistleblower protection in a democratic society. We believe that in rejecting these particular provisions, Poland is in a much stronger position to begin to discuss the value and importance of whistleblowing in a way that will have the greatest chance to strengthen democratic accountability and good governance in the interests of the Polish people in the years to come.

Yours sincerely,

**Public Concern at Work, United Kingdom**

**Whistleblower-Netzwerk, Germany**

**Government Accountability Project, USA**

**Open Democracy Advice Centre, South Africa**

**Transparency International Ireland, Ireland**

**Pištaljka, Serbia**

**Oživení, Czech Republic**

**Centre for Free Expression, Canada**

**Eurocadres, Belgium**  
**Founder of WhistleblowerProtection.EU**

**FreePress Unlimited, Netherlands**

**Article 19, United Kingdom**

**Transparency International**

*Please note these organisations include the founding members of the Whistleblowing International Network (WIN - [www.whistleblowingnetwork.org](http://www.whistleblowingnetwork.org)); those organisations that participate as members of the Network; and those affiliated to the Network who support WIN's aims and objectives.*

## ANNEX A - Statement from the Stefan Batory Foundation, Warsaw, Poland

### **DRAFT LAW ON TRANSPARENCY IN PUBLIC LIFE: WHISTLEBLOWER PROTECTION**

The Batory Foundation has advocated for whistleblower protection for a number of years. Whistleblowers are individuals who while acting in the public interest and in good faith will disclose abuse or malpractice at a workplace against the public interest or the employer's interest. Whistleblower protection legislation exists in several dozen countries including the US, the Netherlands, Australia, France, Ireland, the United Kingdom, Serbia, Hungary, or Slovakia. The European Commission is considering adopting a whistleblower protection directive. The Polish legislation should follow in the footsteps of existing legislation elsewhere mainly by being preventive and contributive to an improved corporate culture at the workplace.

The draft whistleblower legislation presented by the Prime Minister Office is repressive in nature. It totally contradicts **the concept of whistleblowing**. **What it really does is it introduces the concept of a "semi-witness" or an "informant"**. **If the bill is adopted, prosecutors take arbitrary decisions on whether someone is and is not a whistleblower putting such individuals at their mercy. Deprived of any court protection, whistleblowers will not have the right to appeal prosecutors' whistleblower status decisions. For example, a prosecutor may choose not to grant the whistleblower status if he or she deems the workplace information received from the individual at hand falls short of his or her expectations. Moreover:**

- It narrows down the whistleblower status exclusively to individuals who have reported suspected corruption crimes and have decided to share their knowledge outside of their workplace. However, it fails to protect individuals who may report threats which are not considered crime or corruption, e.g. safety hazards or antisocial behaviour that may only potentially result in the loss of assets, or employers' life or health, mobbing or any other breach of personal dignity;
- The promised protection of whistleblowers against the loss of employment or a deterioration of working conditions is illusory. Such informers may actually be deprived of it at any time subject to a prosecutor's decision if a pre-trial investigation cannot be launched;
- The proposed provisions do not motivate employers or trade unions to develop ethical management practices or internal whistleblower protection policies. They do not even propose general standards for such corporate policies;
- Instead, a mechanism has been created that may be abused by law enforcement agencies in violation of socially acceptable practices and the freedom of business activity to put employers under surveillance and influence private sector behaviours. Prosecutors are being given tools to exert pressure on employees by having a discretionary power to grant or withhold the whistleblower status while expecting that the individuals provide specific information. On the other hand, prosecutors may put pressure on employers to plead guilty it may threaten to refuse a permission or to impose a penalty for changing working conditions for employees granted the whistleblower status. Thus, the legislation undermines social trust in the work environment. It creates a risk that individuals who expose abuse may be perceived as denouncers and it opens the door for abuse by the law enforcement.



## Recommendations

According to the Transparency International whistleblower legislation principles developed in partnership with the Batory Foundation ([http://files.transparency.org/content/download/696/2991/file/2013\\_WhistleblowerPrinciples\\_EN.pdf](http://files.transparency.org/content/download/696/2991/file/2013_WhistleblowerPrinciples_EN.pdf)) or the OECD recommendation ([http://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](http://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)) whistleblowers should receive protection under a dedicated piece of legislation. The reasons include but are not limited to a high level of complexity of the matter at hand and the need to include labour, civil and criminal law considerations.

First and foremost, whistleblower legislation should guarantee that employees can safely, and anonymously (if appropriate) expose misconduct **inside their company** to minimise their fear of retaliation from their employer or work colleagues. Such retaliation may include disciplinary sanctions, a downgrade of working conditions, termination, mobbing, intimidation, ostracism etc.). Furthermore, whenever a whistleblower is forced to share the information outside of the workplace (e.g. with media or law enforcement agencies) he/she should be protected against being accused of libel or breach of personal rights and should receive government support. This may include legal assistance, a strengthened the position before the court (e.g. by shifting the burden on proof on the employer if such employer is trying to undermine the whistleblower's statements). A special role in whistleblower protection should be played by trade unions, whose mission is to represent and protect the interest of workers.

Here is a list of selected detailed reviews and recommendations developed by BF:

- *Whistleblower Legislation in Poland. About the Need and the Prospects* – [http://www.sygnaLista.pl/wp-content/uploads/2016/10/Ustawa-o-ochronie-sygnaListow-w-Polsce\\_PP.pdf](http://www.sygnaLista.pl/wp-content/uploads/2016/10/Ustawa-o-ochronie-sygnaListow-w-Polsce_PP.pdf)
- *The Implementation of Selected Provisions of the UN Convention against Corruption in Poland* - <http://www.sygnaLista.pl/wp-content/uploads/2016/10/UNCAC.pdf>
- *The Goals of the Law on the Protection of Individuals Exposing Abuse in Work Environment. How Can Polish Legislators Tap into the Experience of Foreign Countries?* - <http://www.sygnaLista.pl/wp-content/uploads/2016/10/AWN-Zalozenia-do-ustawy-o-ochronie-osob-sygnaListujacych-nieprawidlowosci.pdf>
- *How Do You Expose Crooks? A Short Guide to Whistleblowing* – [http://www.sygnaLista.pl/wp-content/uploads/2016/10/Poradnik\\_Jak\\_zdemaskowac\\_szwindel\\_grudzien\\_2008.pdf](http://www.sygnaLista.pl/wp-content/uploads/2016/10/Poradnik_Jak_zdemaskowac_szwindel_grudzien_2008.pdf)
- For further go to: <http://www.sygnaLista.pl>

## ANNEX A - Evaluation criteria – based on Council of Europe Principles<sup>4</sup> and Explanatory Memorandum<sup>5</sup>

<b>Definitions</b>	
	Definition of whistleblower
	Definition of public interest report or disclosure
	Definition of reporting
	Definition of disclosure
<b>Material scope</b>	
<b>1</b>	National framework should establish rules to protect rights and interests of whistleblowers
<b>2</b>	Scope of public interest
<b>Personal scope</b>	
<b>3</b>	Wide understanding of working relationships
<b>4</b>	Covers individuals whose work-based relationship has ended, as well as those in pre-contractual negotiation stage
<b>5</b>	Rules applying to information relating to national security in keeping with European Court of Human Rights jurisprudence (see also Global Principles on National Security and the Right to Information <sup>6</sup> ).
<b>6</b>	Without prejudice to rules for the protection of legal and other professional privilege
<b>Normative framework</b>	
<b>7</b>	Comprehensive and coherent approach to facilitating whistleblowing
<b>8</b>	Restrictions and exceptions should be no more than necessary
<b>9</b>	Ensure effective mechanisms for acting on public interest reports and disclosures
<b>10</b>	Protection and remedies under rules of general law for those prejudiced by whistleblowing are retained
<b>11</b>	Employers cannot call on legal or contractual obligations to prevent or penalise someone from making a public interest disclosure
<b>Channels for reporting and disclosures</b>	

<sup>4</sup> Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers (*Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies*) and Explanatory Memorandum  
<https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

See also: Council of Europe Technical Paper (2014) Expert opinion on the draft "Law on Protection of Whistleblowers" by Paul Stephenson and Wim Vandekerckhove. Page 22-25.

[http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACS-Serbia/Technical%20Paper/TP8%202014%20PACS%20Expert%20Opinion-draft%20Law-Protection-Whistleblowers\\_EN.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACS-Serbia/Technical%20Paper/TP8%202014%20PACS%20Expert%20Opinion-draft%20Law-Protection-Whistleblowers_EN.pdf)

<sup>5</sup> CM(2014)34-addfinal Explanatory memorandum to Recommendation CM/Rec(2014)7 of the Committee of Ministers  
[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5ef5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ef5)

<sup>6</sup> In a Resolution adopted on 12th March 2014 on the "US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs" Parliament called for stronger whistleblower protection in Europe, notably in the field of national security, to provide a safe alternative to silence for disclosing or reporting of wrongdoing, including corruption, criminal offences, breaches of legal obligation, miscarriages of justice and abuse of authority, in line with the provisions of different international (UN and Council of Europe) instruments against corruption, the principles laid out in the PACE Resolution 1729 (2010), and the Global Principles on National Security and the Right to Information (the "Tshwane Principles") 2013. See Resolution at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0230&language=EN&ring=A7-2014-0139>. See Tshwane Principles at: <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>

12	Measures foster an environment that encourages disclosure in an open manner
13	Clear mechanisms for reporting are in place
14	Channels for reporting include wider public accountability, such as via the media, as per Article 10 - freedom of expression - of the European Convention on Human Rights Act and in keeping with European Court of Human Rights jurisprudence.
15	Encouragement for employers to put in place internal procedures
16	Workers to be consulted on internal procedures
17	Internal reporting and disclosures to regulatory bodies to be encouraged as general rule (but not required)
<b>Confidentiality</b>	
18	Reporting persons entitled to confidentiality
<b>Acting on reporting and disclosure</b>	
19	Reports should be promptly investigated
20	Reporting persons should be informed of action taken
<b>Protection against retaliation</b>	
21	Protection should be against retaliation of any form
22	Protection retained even where reporting person reasonably but mistakenly believed that a specific malpractice was occurring.